Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Request of U S WEST Communications, Inc.	)	97-90
for Interconnection Cost Adjustment	)	
Mechanisms	)	

OPPOSITION OF U S WEST, INC. TO PETITION FOR DECLARATORY RULING AND CONTINGENT PETITION FOR PREEMPTION

U S WEST, Inc. hereby files this Opposition to a Petition for Declaratory Ruling and Contingent Petition for Preemption ("Petition") filed February 20, 1997 by Electric Lightwave, Inc., McLEODUSA Telecommunications Services, Inc. and NEXTLINK Communications, L.L.C. (hereinafter collectively "Petitioners"). Petitioners seek a declaratory ruling that U S WEST Communications, Inc.'s ("U S WEST") state filings seeking recovery of the costs of providing interconnection to carriers pursuant to Sections 251 and 252 of the Telecommunications Act of 1996[1] violates the Act and is anticompetitive.

In a perverse sort of way, the Petition is truly a welcome event. Never before has an interconnector been so brazen in its demand that the Federal Government expropriate the private property of incumbent local exchange carriers ("ILEC") on behalf of the interconnector. Now the fundamental demand for free service by at

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("the Act").

least some interconnectors is clear. Some selected passages from the Petition are illustrative:

> If these companies are forced to incur the costs associated with building not only their own networks, but also with upgrading and rearranging U S West's networks to allow U S West to continue to operate as the [ILEC] in the newly-competitive telecommunications environment, these competitors will be severely hampered in their efforts to continue their current services as well as to expand their service offerings to additional areas throughout U S West's territory.[2]
>
> The costs associated with upgrading and rearranging an incumbent LEC's network to provide the necessary interconnection pursuant to Section 251 of the Act are not permitted to be recovered through an ILEC's charges for interconnection and network elements.[3]
>
> ILEC costs associated with network rearrangements required to fulfill the pro-competitive mandates of the 1996 Act are not recoverable interconnection costs pursuant to Section 252(d).[4]

In other words, Petitioners want the Federal Communications Commission ("Commission") to decree that U S WEST must reconfigure its network, modify its systems and unbundle its network to provide facilities and services to Petitioners for free. And Petitioners proclaim that the Commission, as an agency of the Federal Government, has the power -- indeed, the duty -- to accomplish this seizure without compensating U S WEST. This is an astonishing proposition.

In reality, the Commission is left with two choices. The Commission can (and we submit should) affirmatively support U S WEST's ability to recover those costs identified in the Interconnection Cost Adjustment Mechanisms ("ICAM"), as it

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[2] Petition at 4.

[3] Id.

[4] Id. at 7.

provides an auditable way for U S WEST to identify accurately unbundling and interconnection start-up costs. In the alternative, the Commission can take the necessary steps to formalize an affirmative taking of U S WEST's property and relegate U S WEST to the Federal Claims Court for the establishment of just compensation.

Initially, some background is appropriate as Petitioners have seriously misstated some of the relevant facts. U S WEST has developed its ICAM to assist U S WEST in determining the cost of extraordinary start-up costs it will incur to provide interconnection, unbundled network elements and service available for resale in a clear and auditable manner. The attached affidavit of Jerrold L. Thompson documents the development and use of the ICAM. U S WEST has proposed options to its state commissions for recovery of these extraordinary costs. One option is a surcharge assessed to interconnectors actually using the elements and interconnection which has caused the identified costs to be incurred. Other options consider end user charges.[5] U S WEST has a legal and constitutional right to recover these costs from interconnectors, its retail customer or from the responsible governmental entity. The ICAM filings are limited to costs which are not recovered elsewhere. In two states, specific surcharge numbers have been proposed because of state requirements that the ICAM charges be recovered via a tariff filing. In no state has a specific mechanism for recovery of the costs identified

[5] Indeed, in the ICAM filing attached to the Petition (Utah), U S WEST also gives state regulators the option to permit recovery of ICAM costs from the general body of ratepayers. Id. at Appendix A at 6-8.

in the ICAM been finalized, and the ICAM remains a proposed vehicle for identifying and tracking interconnection costs. U S WEST would be, of course, happy to share the ICAM with the Commission, but has generally assumed that the proper vehicle for recovery of extraordinary interconnection costs was pursuant to state proceedings and Federal appeals under Section 252 of the Act and state law. Contrary to Petitioners' claim,[6] nothing in any ICAM filing would limit the ability of a state commission to assess to U S WEST its appropriate share of ICAM costs to the extent that these costs will be used by or provide benefit to U S WEST.

U S WEST has not, as claimed in the Petition, asserted that the Act itself precludes recovery of the interconnection costs identified by the ICAM.[7] To the contrary, it has always been U S WEST's position that these costs are fully recoverable from interconnectors under the Act. Similarly, U S WEST has not asked that any state regulator (or this Commission, for that matter) declare that the Act is unconstitutional.[8] In fact, the Act clearly envisions that all of U S WEST's costs of providing interconnection will be recovered from interconnectors, including a reasonable profit. Indeed, U S WEST did not claim that the Act was unconstitutional in its comments before the Commission in the Interconnection Docket (CC Docket No. 96-98) because of precisely this essential premise -- that U S WEST was specifically entitled to recover its interconnection costs from interconnectors.

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[6] Id. at 11.

[7] Id. at 4, 6.

In fact, the Commission's Report and Order in the Interconnection Docket was quite explicit in reaching precisely this conclusion.[9] A random sampling of language from the Report and Order documents this obvious point:

> Of course, a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit.[10]

> As we discuss below, we do not believe that this [unbundling] obligation is unduly burdensome to incumbent LECs because the 1996 Act requires a requesting carrier to pay the costs of unbundling, and thus incumbent LECs will be fully compensated for any efforts they make to increase the quality of access or elements within their own network.[11]

> As discussed above, some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(c)(3). The requesting carrier would, however, bear the cost of compensating the incumbent LEC for such conditioning.[12]

> We find that it is technically feasible to unbundle IDLC-delivered loops. . . . Again the costs associated with these mechanisms will be recovered from requesting carriers.[13]

Thus, the simple answer to the Petition is that the ICAM is fully consistent with the Act and the Commission's implementing regulations thereunder. This would be true even if the Commission's interconnection pricing rules were fully in effect

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[8] Id. at 7.

[9] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, FCC 96-325, rel. Aug. 8, 1996 ("Report and Order").

[10] Id. ¶ 199.

[11] Id. ¶ 314 (footnotes omitted).

[12] Id. ¶ 382 (footnotes omitted).

[13] Id. ¶ 384.

today.[14] ICAM is simply an accurate method of determining and tracking the extraordinary interconnection and unbundling start-up costs which U S WEST will incur to enable competition and that it can lawfully charge to interconnectors. The extent to which such costs will actually be charged to interconnection (as opposed to end users) is a matter for initial resolution by state authorities. But the notion in the Petition that Petitioners are entitled to have ILEC networks reconfigured for their benefit for free is a notion which has never found any support in the decisions of this Commission. The Petition can be dismissed on that account alone.

However, three aspects of the Petition deserve additional, if brief, mention.

First, the Petition repeatedly claims that competition would be thwarted if Petitioners are required to actually pay for the network services and facilities which they demand. Typical is the following assertion:

> Congress struck a balance between affording ILECs a reasonable opportunity to recover their costs on the one hand, and not erecting economic barriers to local service competition on the other hand. That carefully-crafted balance and the pro-competitive goals of the 1996 Act would be frustrated by the recovery of extraordinary costs of providing interconnection and network elements beyond that specifically permitted by the 1996 Act, as proposed by U S West in its various state petitions seeking to implement ICAM charges.[15]

This argument is nothing less than mouthing the word "competition" as a shibboleth without offering the slightest insight into what it actually means. Competition cannot possibly be advanced in any meaningful sense by the

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[14] The Commission's pricing rules have been stayed pending final decision by the Eighth Circuit Court of Appeals. Iowa Utilities Board, et al. v. FCC, CN 96-3321, et al. (8th Cir.)

[15] Petition at 7.

governmental expropriation of private property -- be it the property of ILECs or others. Congress was very careful to spell this out in the Act, and the Commission was equally adroit in this area in its Report and Order. If Petitioners really cannot flourish without extensive governmental subsidies, such as they demand, they are simply not capable of competing at all. The Act and the Report and Order require that ILECs share with interconnectors certain economies of scale and scope which are residual from the days when ILECs possessed statutory monopoly rights. Providing access to essential facilities is a long-standing requirement of the law.[16] While the Report and Order goes well beyond standard antitrust and economic principles in establishing interconnection rights and obligations, it has not deviated from the fundamental principle that competitors must ultimately compete based on their own abilities, not based on their ability to pilfer facilities and services from ILECs. The idea that competition cannot flourish if competitors are actually required to pay for what they purchase is as foreign to economics as it is to the Act and the Commission's Report and Order.

In a similar vein, Petitioners contend that U S WEST is entitled to no constitutional protection whenever the government forces U S WEST to construct facilities for a competitor unless U S WEST is deprived of the ability to recover the cost incurred in complying with such a governmental mandate altogether.[17] While it is not necessary to address the constitutional issues involved in coerced

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[16] See United States v. Terminal R. Asso., 224 U.S. 383 (1912).

[17] Petition at 13-14.

governmental construction in this Opposition, it is necessary to reiterate what we submit is a fundamental principle: when the government forces anyone -- be it U S WEST, Petitioners, or an individual citizen -- to construct facilities for another, full compensation must be paid for that specific coerced action. Coerced construction cases are not the same as confiscatory ratemaking cases. When the Government seized the Youngstown Steel plant, it was no defense to the seizure that the plant might make a profit under its new owners.[18] To the contrary, as pointed out in U S WEST's comments in the Interconnection Docket,[19] such government-forced action is much more akin to a physical seizure of property, and would constitute a per se taking requiring direct and tangible compensation.

This is a really significant point. Forced servitude, whether of an individual or a corporation, is no minor matter under the Constitution. Petitioners' flippant treatment of the constitutional implications of their demand that the Government force U S WEST to construct facilities for Petitioners, but permit Petitioners to avoid paying for such construction, is utterly at odds with the fact that the constitutional issues are of truly major consequence. Indeed, failure of both federal and state regulators to sufficiently respect the property rights of ILECs, should it materialize, could hold the potential to undermine the proper implementation of the Act itself. And, contrary to the assertion of Petitioners, U S WEST's legal actions to forestall such confiscation cannot be considered either anticompetitive or frivolous.

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[18] Youngstown Sheet & Tube Co. v. Sawyer, 72 S.Ct. 863 (1952).

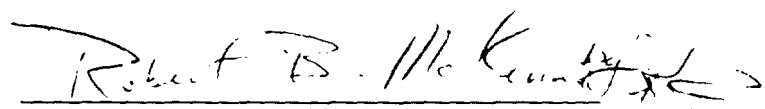
[19] Comments of U S WEST, Inc., CC Docket No. 96-98, filed May 16, 1996 at 32-35.

Finally, Petitioners profess shock and amazement that U S WEST has asserted that governmental entities have no right to coerce uncompensated construction, and that U S WEST might be forced to reevaluate its expenditure level based upon the allowed recovery vehicle.[20] Indeed, Petitioners characterize this U S WEST position as both rude ("bullying") and potentially criminal ("extortionist"). Again, U S WEST submits that it is not a remarkable proposition that an American citizen can decline to perform uncompensated forced labor. While the issue of the government's authority to force a citizen to perform service is obviously a complicated one, the fundamental proposition that U S WEST will not work for free is neither exceptional nor radical. In the competitive marketplace, the government must be very careful when it chooses to load public burdens on selected industry players.

For the foregoing reasons, U S WEST submits that the Commission should actively support U S WEST's ICAM filings, and that the Petition should be denied.

Respectfully submitted,

U S WEST, INC.

By: 

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Its Attorney

Of Counsel,
Dan L. Poole

March 3, 1997

[20] Petition at 12-13.

AFFIDAVIT OF JERROLD L. THOMPSON

Jerrold L. Thompson, having been first duly sworn, deposes and states as follows:

1. I am employed by U S WEST Communications, Inc. as Director-Regulatory Finance. My business address is 1801 California St., Denver Co.

2. I have been asked to discuss how the proposed U S WEST interconnection cost adjustment mechanism (ICAM) will work. U S WEST proposes to use its accounting system to identify costs related to the introduction of competition and interconnection. To assist in this effort, U S WEST has developed an Interconnection Cost Tracking Manual. The purpose of the Manual is to document the methodology the Company will use for identifying, tracking and auditing the actual accounting costs related to local competition and interconnection. It is very important to note that while the Manual will track on-going costs of providing interconnect services, only the initial or "start-up" costs of implementing competition and interconnection will be identified for ICAM purposes.

3. U S WEST will report actual accounting costs on a quarterly basis. Rates or riders will be adjusted to reflect the level of expenditure for these costs, with a delay of approximately three months. This process would continue for three years. At the end of the three year period, a final true-up would be made to complete the recovery of the costs. Since only the

costs that were identified as appropriate would be tracked, recovery would be limited to these costs.

4. In first quarter 1997, U S WEST will track what it believes are the costs appropriate for this process. It will report to the state commissions what it has expended in expense and capital during this period. This tracking, reporting and billing process would continue through the thirty-six month period under the proposal.

5. The costs, which will be tracked on a quarterly basis, could be adapted to various recovery and true-up schedules. The method proposed by U S WEST would start the recovery process with costs incurred through first quarter 1997. These amounts would be amortized over the next six month period. Costs for second quarter 1997 would be amortized over the next six month period, and so forth. This process would result in a rolling six month amortization of the costs. Recovery methods could be set at quarterly, six month intervals, or longer, to attempt to match recovery with the cost.

6. Detailed records and reports will be created and maintained to allow annual audits of the accounting and the process. Audits by state commission staffs, external auditors, or other parties can be undertaken

and adjustments, if any, can be included in the quarterly adjustments or the final true-up.

7. Specific planning has been included to facilitate auditing of the tracking process. The U S WEST Tracking Manual contains an audit section, and detailed records, calculations, and physical support for the transaction accounting will be created and maintained for review.

Dated: February 28, 1997

Jerrold L. Thompson

STATE OF COLORADO :
: ss.
CITY & COUNTY OF DENVER :

Subscribed and sworn to before me this 28th day of February, 1997, by Jerrold L. Thompson.

Witness my hand and official seal.

My Commission Expires:

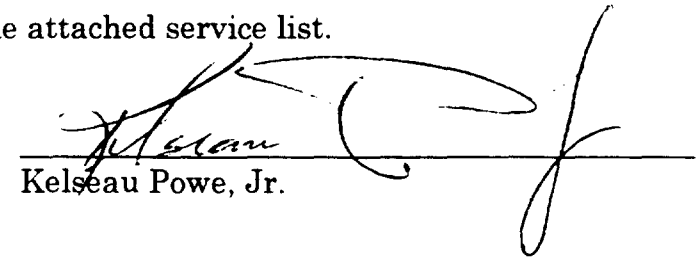
June 17, 1998

Rebecca J. Albritton

NOTARY PUBLIC
REBECCA J. ALBRITTON
STATE OF COLORADO

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 3rd day of March, 1997, I have caused a copy of the foregoing **OPPOSITION OF U S WEST, INC. TO PETITION FOR DECLARATORY RULING AND CONTINGENT PETITION FOR PREEMPTION** to be served via first class United States Mail, postage prepaid, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

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